1-14-2009

State v. Adams Appellant's Reply Brief Dckt. 34220

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. CLAYTON ADAMS, Defendant-Appellant.	)	NO. 34220 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE RENAE HOFF
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

JASON C. PINTLER
Deputy State Appellate Public Defender
I.S.B. # 6661
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

STATEMENT OF THE CASE

Nature of the Case

Clayton Adams appeals from the Judgment and Commitment entered upon a jury verdict finding him guilty of one count of second degree murder and one count of aggravated battery. Mr. Adams was sentenced to a unified term of life, with twenty-five years fixed, for the murder conviction, and a consecutive term of ten years, with three years fixed, for the aggravated battery conviction. Mr. Adams timely appealed and raised the following issues in his Appellant's Brief.

First, Mr. Adams asserts that he was denied his constitutional right to a jury trial and right to a fair trial when the district court failed to remove a juror who candidly admitted that she felt it was unfair that a court in a criminal trial would withhold evidence from the jury. Juror 608 stated that she would merely do her best not to hold against Mr. Adams, instances during the trial where information was withheld from her. Second, Mr. Adams asserts that he was denied his right to a fair trial by the prosecutor appealing to the passions of the jury when, during closing argument, the prosecutor asked the jury to give the alleged victims, and Mr. Adams, "justice." Third, Mr. Adams asserts that if the above errors are deemed individually harmless, the combination of having a biased juror sit in his case and the prosecutorial misconduct that occurred requires reversal of his conviction under the doctrine of cumulative error. Finally, Mr. Adams asserts that the district court abused its discretion by executing an excessive sentence in light of the specific facts and circumstances of this case.

In its Respondent's Brief, the State makes numerous arguments in support of their request that this Court affirm Mr. Adams' conviction and sentence. This Reply Brief is necessary to address some of the State's arguments.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Adams's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES[1]

1. Did the district court deny Mr. Adams his constitutional rights to a jury trial and to a fair trial when, after Juror 608 candidly admitted that she would hold any perceived withholding of information against the defendant, the district court denied Mr. Adams the ability to get an unequivocal assurance from Juror 608 that she would not hold such a withholding of information against Mr. Adams and when the district court failed to remove the juror?

2. Did the prosecutor violate Mr. Adams' due process right to a fair trial by committing misconduct in appealing to the passions and prejudices of the jury by asking them to provide "justice" to the alleged victims and "justice" to Mr. Adams?

[1] In his Appellant's Brief, Mr. Adams also raised the issues, "Does the combination of the above errors, even if individually harmless, require reversal of Mr. Adams' convictions under the doctrine of cumulative error?" and "Did the district court abuse its discretion by executing an excessive sentence upon Mr. Adams in light of his young age, the role alcohol played in the instant offense and his desire for treatment, the support he enjoys from his family and friends, and his remorse?" Mr. Adams' arguments in support of his claims of error are fully articulated in the Appellant's Brief and need not be repeated in this Reply Brief but are incorporated herein by reference thereto.

ARGUMENT

I.

The District Court Denied Mr. Adams His Constitutional Rights To A Jury Trial And To A Fair Trial When, After Juror 608 Candidly Admitted That She Would Hold Any Perceived Withholding Of Information Against The Defendant, The District Court Denied Mr. Adams The Ability To Get An Unequivocal Assurance From Juror 608 That She Would Not Hold Such A Withholding Of Information Against Mr. Adams And When The District Court Failed To Remove The Juror

A. Introduction

In his Appellant's Brief, Mr. Adams asserted that because the district court denied Mr. Adams the right to require Juror 608 to unequivocally promise not to hold any perceived withholding of information against him, and because the district court failed to remove Juror 608, Mr. Adams was denied his right to a jury trial, and a fair trial, and his conviction must be vacated. In response, the State makes four main arguments. First, the State argues that because Mr. Adams did not move to remove Juror 608 for cause, the issue is not preserved for appeal. (Respondent's Brief, p.13.) Second, relying upon out of state precedent, the State asserts that the district court was correct in denying Mr. Adams the ability to obtain a "promise" that Juror 608 would not be biased against him and did not "curtail" Mr. Adams ability to determine whether Juror 608 could be impartial through "proper questioning." (Respondent's Brief, pp.13-15.) Third, the State asserts that Mr. Adams failed to show that Juror 608 should have been struck for bias. (Respondent's Brief, pp.15-17.) Finally, the State asserts that Mr. Adams cannot establish that he was prejudiced by Juror 608 remaining on the jury. (Respondent's Brief, pp.18-24.) Each of these arguments is discussed below.

B. The District Court's Denial Of Mr. Adams' Ability To Obtain An Unequivocal Assurance From Juror 608 That She Would Not Use The Withholding Of Information Against Him And The District Court's Failure To Remove Juror 608 Are Ripe For Appellate Review

The State asserts that: "It is well settled in Idaho that challenges to the suitability of jurors must be made before the jury is empanelled." (Respondent's Brief, p.13 (citing I.C. § 19-2006; *State v. Hansen*, 127 Idaho 675, 678, 904 P.2d 945, 948 (Ct. App. 1995) (in turn citing *State v. Yon*, 115 Idaho 907, 771 P.2d 925 (Ct. App. 1989); *State v. Ruybal*, 102 Idaho 885, 643 P.2d 835 (Ct. App. 1982))).) The State further asserts that: "Failure to challenge a juror for cause indicates satisfaction with the jury selected." (Respondent's Brief, p.13 (citing *State v. Bitz*, 93 Idaho 239, 243, 460 P.2d 374, 378 (1969).) The State argues that Mr. Adams "newly found appellate disgruntlement should not be considered." (Respondent's Brief, p.13.) The State's argument in this section of its brief fails to acknowledge that that Mr. Adams raised his claim under the doctrine of fundamental error and that Idaho precedent (including precedent cited by the State) makes clear that such a claimed error can be raised for the first time on appeal.[2]

In *Hansen*, cited by the State, the Idaho Court of Appeals stated, "[w]e have previously held that when a challenge to the jury is not raised in a timely fashion, we will not consider it on appeal, **unless, the appellant can show that the error constituted fundamental error**." *Hansen*, 127 Idaho at 678, 904 P.2d at 948 (citing *State v. Yon*, 115 Idaho 907, 909, 771 P.2d 925, 927 (Ct. App. 1989) (emphasis added).) Furthermore, in *Bitz*, the Idaho Supreme Court was not presented with the question of whether the potential juror bias in that case was a question of fundamental error; rather,

[2] The State later recognizes that a challenge to the jury selection process can be raised for the first time on appeal under a fundamental error claim. (Respondent's Brief, p.15.)

the Court was presented with the question of whether the district court erred in denying the defendant's motion for a change of venue. *Bitz*, 93 Idaho at 242-43, 460 P.2d at 377-78.) Finally, as articulated in the Appellant's Brief, the Idaho Supreme Court has recently as last year entertained a challenge to a biased juror for the first time on appeal under the doctrine of fundamental error. (Appellant's Brief, pp.14-16 (citing *State v. Johnson*, 145 Idaho 970, 978-79, 188 P.3d 912, 920-21 (2008).) Thus, the State's claim that this issue is not ripe for appellate review is in conflict with established Idaho precedent and is without merit.

C. The District Court's Denial Of Mr. Adams' Request Of A "Promise" From Juror 608 Not To Hold A Perceived Withholding Of Information Against Mr. Adams Denied Mr. Adams The Ability To Get An Unequivocal Assurance That Juror 608 Would Not Be Biased

The State next attempts to argue that the district court did not curtail Mr. Adams' ability to determine whether Juror 608 could be fair and impartial; rather, the district court was merely properly concerned about using the term "promise." (Respondent's Brief, pp.13-15.) Citing precedent from other jurisdictions that have nothing to do with the issue of juror bias, the State argues the district court was merely concerned with the form of the question. (Respondent's Brief, pp.13-15.) The State's argument is without merit.

The primary authority the State cites for its proposition that the district court was merely correctly concerned about using the term "promise" is *State v. Holmquest*, 243 S.W.3d 444 (Mo. App. 2007). In *Holmquest*, the Missouri Court of Appeals, Western District, was presented with a claim that the prosecution's inquiry into the prospective jurors' credibility determination of an accomplice's testimony, where the accomplice may

accomplice may have been more culpable but given a deal in exchange for their testimony, was an improper attempt to cause the jury to commit to an assessment of the witness' credibility or to predispose the jury. *Id.* at 450-52. The Court recited the applicable legal standards and found that the prosecutor's questions were valid as they were not an attempt to predispose the jury to the witness' credibility or to commit to such a determination and found no error. *Id.* The *Holmquist* case had nothing to do with the issue raised by Mr. Adams; namely, that the district court prevented Mr. Adams from determining whether Juror 608 would be biased against him and the fact that Juror 608 was in fact biased and sat on the jury.[3]

It should be noted that one of the cases relied upon by the *Holmquist* Court is *State v. Clark*, 981 S.W.2d 143 (Mo banc 1998). The *Holmquist* Court stated, "'A defendant is entitled to a fair and impartial jury.' *State v. Clark,* 981 S.W.2d 143, 146 (Mo. banc 1998). The purpose of *voir dire* is to discover potential bias or prejudice in order to select a fair and impartial jury. *Id.* For this reason, liberal latitude is allowed in the examination of potential jurors. *Id.*" *Holmquist* at 451 (internal citations in original). In *Clark*, the Missouri Supreme Court, en banc, held that the district court in a capital murder case improperly denied defense counsel the ability to determine whether the jurors could be impartial knowing that the alleged victim was three years old. *See Clark, generally*. The Court recognized that asking only generic questions about whether the jurors could follow the law was insufficient. *Id.* 981 S.W.2d. at 147. (citation omitted.)

[3] The additional cases cited by the State from Texas and Mississippi (Respondent's Brief, p.14 (citing *Sanchez v. State*, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005) and *Nicholson v. State*, 761 So.2d 924, 927 (Miss. Ct. App. 2000) (further citation omitted)), are equally unavailing but are not discussed further in this brief.

"If only generic questions are asked, biased jurors 'could respond affirmatively, personally confident that [their] dogmatic views are fair and impartial, while leaving the specific concern unprobed.'" *Id.* (quoting *Morgan v. Illinois*, 504 U.S. 719, 738 (1992); *see also Murphy v. Florida*, 421 U.S. 794 (1975).) Here, the State asserts that "Nothing precluded [Mr. Adams' counsel] from asking juror 608 whether she would follow the instructions by the court, decide the case based only on the evidence presented at trial, and be fair to both sides." (Respondent's Brief, p.15.) This limited, generic, questioning is exactly the kind of questioning the Missouri Court holds is insufficient.

Regardless, it is not necessary for this Court to seek authority from other states as Idaho Courts have spoken to the issue of juror bias and a defendant's ability to explore such bias. As noted in the Appellant's Brief (pp.11-13), after examining precedent from other jurisdictions and analyzing the right to a trial by a jury comprised of unbiased jurors under the provisions of the United States Constitution, the Idaho Constitution, and the relevant statutes, the Idaho Court of Appeals found as follows:

> We agree with those courts that have concluded that any justified doubt that a venireman can "stand indifferent in the cause" ought to be resolved in favor of the accused. *Justus v. Commonwealth*, 220 Va. 971, 266 S.E.2d 87, 90 (1980). *See also* [*United States v.*] *Gonzalez,* 214 F.3d [1109], 1114 [(9th Cir.2000)]. This resolution gives full effect to the language in I.C. § 19-2019(2), which calls for disqualification of a juror who exhibits a state of mind that "leads to the inference that he will not act with entire impartiality." In our view, when a juror admits bias, and gives no unequivocal assurance of the ability to be impartial despite several efforts by the court or counsel to elicit such an assurance, an inference that he will not act with *entire* impartiality becomes inescapable.

State v. Hauser, 143 Idaho 603, 609-610, 150 P.3d 296, 302-303 (Ct. App. 2007). Furthermore, while not explicitly adopting the Court of Appeals' reasoning in *Hauser*, the Idaho Supreme Court recently entertained an argument citing *Hauser* as precedent,

wherein the Court did not reject the Court of Appeals' holding; rather, the Supreme Court merely distinguished the facts of the case presented from the facts presented in *Hauser*. *See State v. Johnson*, 145 Idaho 970, 979-980, 188 P.3d 912, 921-922 (2008). Whether it is referred to as an "unequivocal assurance" or a "promise," a criminal defendant has a right to a jury comprised of individuals who will be unbiased, not try to be unbiased, and the State's argument has no merit.

D. Juror 608 Admitted Her Bias And Was Specifically Asked Whether She Would Promise Not To Hold Her Bias Against Mr. Adams Personally

The State next makes the factual argument that "juror 608 did not say, nor was she asked, whether she would assume from repeated trips outside the courtroom that evidence damaging to Adams was being kept out of the jury's view, or whether she would hold such assumption against Adams in determining his case." (Respondent's Brief, p.16.) The State asserts that, "the district court's focus was on preventing defense counsel from obtaining a 'promise' with regard to the possibility that juror 608 might become dissatisfied with counsel if there were repeated trips outside the courtroom: 'Counsel, with all due respect, I'm not going to allow you to require her to promise.'" (Respondent's Brief, p.17 (citation omitted).) The State makes these factual arguments in an attempt to support its argument that the legal holding in *Hauser*[4] does not apply. However, the State misrepresents the facts in this case and their legal argument is without merit.

As is noted in the both the Appellant's Brief (pp.2-4) and the Respondent's Brief (pp.10-12), after Juror 608 discussed her displeasure with sitting as a juror yet having

[4] *State v. Hauser*, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2007).

information she may feel is important withheld from her, the following exchange took place:

> MR. ONANUBOSI (defense counsel): You know, there might be an occasion, an instance or occasion where we might have to take up some legal issues, and we might have to do that in the absence of the jury.
>
> JUROR NO. 608: Yes.
>
> MR. ONANUBOSI: That we might have to excuse the jury. Will you promise me that you will not hold that against either myself or the State if that happens in this case?
>
> JUROR NO. 608: Do I promise? No.
>
> MR. ONANUBOSI: You cannot promise that?
>
> JUROR NO. 608: (Shakes head.)
>
> MR. ONANUBOSI: **Okay. At least will you be willing to promise me that you will not be willing to hold that against Mr. Adams, the individual I'm trying to help over here**?
>
> THE COURT: **Counsel, with all due respect, I'm not going to allow you to require her to promise**.
>
> MR. ONANUBOSI: Okay. Will you be willing to do your best to make sure if that happens in this case, you do not hold that against Mr. Adams, the individual I'm trying to help in this case?
>
> JUROR NO. 608: Yes, I will do my best.
>
> MR. ONANUBOSI: You will do your best. That's all we can ask for.

(Tr., Vol.II, p.313, L.12 – p.314, L.12. (emphasis added).) The State's argument that defense counsel only asked Juror 608 about her bias towards the attorneys is not reflected in the record. Counsel for Mr. Adams was seeking a promise that Juror 608 would be willing not to hold her bias against Mr. Adams. Because of the district court's

interruption and clear ruling that defense counsel could not require her to promise not to hold her bias against Mr. Adams, Juror 608 was only required to "do [her] best."

Despite defense counsel's statement, a juror's promise that she will "do [her] best" not to hold her admitted bias against the defendant is not "all we can ask." The Court of Appeals made it clear in *Hauser* that a juror's promise to "try" is not enough. *State v. Hauser*, 143 Idaho 603, 609-10, 150 P.3d 296 302-03 (Ct. App. 2007). A potential juror must provide an unequivocal assurance of their ability to be impartial, if not, "an inference that he will not act with *entire* impartiality becomes inescapable." *Id.* The State's attempt to escape the inescapable by misstating the facts of this case leads to the conclusion that the State's argument is without merit.

E. The Error Was Not Harmless

The State next argues that Mr. Adams was not prejudiced by Juror 608 remaining on the jury. (Respondent's Brief, pp.18-24.) In his Appellant's Brief, Mr. Adams first asserted that, like the error found in *Hauser*, the error in this case can not be found harmless. (Appellant's Brief, pp.18-19.) In *Hauser*, after finding that the defendant's rights were violated by having a juror sit on her case that would only "try" to be fair, the Court of Appeals did not apply a harmless error test, i.e. whether "the court [can] declare a belief that it was harmless beyond a reasonable doubt" (*See State v. Christiansen,* 144 Idaho 463, 471, 163 P.3d 1175, 1183 (2007) (citing *Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *accord, State v. Robbins,* 123 Idaho 527, 850 P.2d 176 (1993)).) *Hauser*, 143 Idaho at 610-11, 150 P.3d 296, 303-04. However, the Court of Appeals did recognize that the juror's admission that he would give more weight to and tend to believe a Kootenai County

Sheriff's officer's testimony over that of the defendant "is particularly disquieting in this trial because the State's case turned largely upon the testimony of a detective who had interviewed Hauser, and this detective was the 'victim' of Hauser's alleged willful concealment of information." *Id.* 143 Idaho at 610, 150 P.3d at 603. Because of the fact that having a biased juror sit on a defendant's case leads inextricably to the conclusion that the defendant did not have a fair trial in front of unbiased jurors, Mr. Adams asserts that this Court should find that the error was not harmless.

Mr. Adams recognizes that Juror 608's bias went to a specific set of circumstances, i.e., knowingly being deprived of information that she may want to know. Mr. Adams thus argued in his Appellant's Brief that even if this Court reviews what transpired in this case, in light of Juror 608's admitted bias, this Court cannot declare the error harmless. Mr. Adams' arguments in support of this claim are articulated in his Appellant's Brief and need not be repeated in detail in this brief herein but are incorporated by reference thereto. (*See* Appellant's Brief, pp.19-22.) However, the State's arguments as to why it believes the error is harmless, demonstrates the futility in attempting to apply a harmless error analysis in a situation such as this, where the very process Juror 608 was disgruntled with and the very process that she would only "do her best" not to hold against the defendant occurred during the trial.

Regarding the exclusion of Defense Exhibit A (Mikeal Campbell's Written Statement) the State argues that "an attentive juror 608 would not have thought that any evidence damaging to Adams was being kept from the jury." (Respondent's Brief, p.19.) The State further asserts:

> Hearing all of the discourse leading up to the jury's exclusion from the courtroom, juror 608 would have plainly understood that Defense Exhibit A

> was simply repetitive of Campbell's testimony, and intended to buttress his testimony after it have been impeached by Adams' trial counsel.

(Respondent's Brief, p.20.) In essence, the State speculates as to what Juror 608 improperly speculated and argued that she would not have speculated anything negative against Mr. Adams.

Regarding State's Exhibit 33 (Deputy Miller's Tape Recording), the State guesses that Juror 608 would not have speculated "that anything damaging about Adams had been kept out of the trial – unless she engaged in totally unrestrained speculation." (Respondent's brief, pp.21-22.) This time, the State guesses as to what Juror 608 did not speculate unless her speculation was unrestrained.

Finally, regarding Deputy Faulhaber's Volunteered Comment, the State guesses that after Deputy Faulhaber stated that she had "dealt with" Mr. Adams before and the jury was sent out, Juror 608 would not have speculated that the defense was trying to keep out evidence sought by the State apparently because juror 608 would have realized the State's witness volunteered the information rather than being directly asked whether she had "dealt with" Mr. Adams in the past. The State then asks this Court to join in its guessing.

The problem with the State's argument, beyond the fact that it is based on pure speculation, is the fact that it assumes that Juror 608 would speculate in a manner the State determines is reasonable. However, it is the act of speculating itself that makes Juror 608 an unreasonable, biased juror. Mr. Adams has a right to an impartial jury of 12 individuals all of whom can give an unequivocal assurance (i.e. "promise") that they will not be biased against the defendant, including not speculating about issues discussed outside their presence and holding it against the defendant, not the right to

11 such jurors and one who only has to do her best not to hold her own speculations against the defendant.

Juror 608 admitted that in her previous experience she felt like information was being kept from her and then later found out, from the prosecutor, what the information being kept from her was - she did not like it and basically admitted that would hold it against the parties. In this case, she was told, that all she had to do was try not to hold interruptions in the proceedings, where the jury was sent out for the parties to discuss what evidence would be admitted, against the defendant. The State now asks this Court to speculate that Juror 608's speculations were not against Mr. Adams.

The State relies upon the Idaho Supreme Court's holding finding that a "single instance of the judge instructing the jury to disregard evidence presented by a specialist [the very issue that the juror in question in that case stated he would not disregard], is insufficient to show Johnson sustained any prejudice by juror 85's presence on the panel." (Respondent's Brief, p.19 (citing *State v. Johnson*, 145 Idaho 970, ___, 188 P.3d 912, 922 (2008) (internal parenthetical added).) Notably, the Supreme Court did not engage in speculation as to what the juror in that case would have believed based upon his statements during *voir dire*. This Court should not engage in speculation either.

Fatal to the State's argument is that this type of speculation, by its very nature, cannot lead this Court to conclude beyond a reasonable doubt, that Juror 608's presence on the jury was harmless. Even under the State's analysis, this Court can only speculate that the error was harmless. Speculation does not support a finding *beyond a reasonable doubt*, of harmlessness. The State's argument is without merit.

II.

The Prosecutor Violated Mr. Adams' Due Process Right To A Fair Trial By Committing Misconduct In Appealing To The Passions And Prejudices Of The Jury By Asking Them To Provide "Justice" To The Alleged Victims And "Justice" To Mr. Adams

A. Introduction

In his Appellant's Brief, Mr. Adams asserted that the prosecutor committed misconduct during his rebuttal closing argument by appealing to the passions and prejudices of the jury by exclaiming that the State was seeking "justice" for Mikeal Campbell, Stephen Maylin, and Tyler Gorely, and by seeking "justice" for Clayton Adams. (Appellant's Brief, pp.22-27.) In response, the State argues that the prosecutor asking the jury to mete out "justice" was not misconduct and did not constitute fundamental error. (Respondent's Brief, pp.24-30.) Mr. Adams now addresses the State's arguments.

B. Regardless Of Whether The Prosecutor's Calls For Justice Were *For* The Crimes Alleged, The Prosecutors Calls Constitute Misconduct And The Error Was Not Harmless

The State first argues that the "prosecutor's calls to justice were actually 'for' the various crimes Adams was charged with committing – not the brief asides partially describing each person's role on the early morning of March 11, 2006." (Respondent's Brief, p.28 (*citations omitted*).) The State further argues that asking the jury to mete out "justice" is not improper. (Respondent's Brief, pp.28-29.) To reiterate, the misconduct that Mr. Adams alleges stems from the following passage: First the state argued, "I just want to make it real clear what it is that we are asking for. We are asking for **justice**." (Tr., Vol.III, p.973, Ls.22-23 (emphasis added).) The state continued:

> We spoke at the beginning about how on March 11th of '06, Clayton Adams was in the driver's seat, how he's not anymore, that you are. And as you take that wheel and we slide into the back seat, mere passengers at this point, we ask one thing, that you take us home, home to **justice**, **justice** for Mike Campbell who watched his friend die, **justice** for Stephen Maylin who got stabbed trying to run away from someone he didn't even know, **justice** for Tyler Gorley whose death is the reason we are here and whose life is insulted by the story that he wants you to believe, and **justice** for Clayton Adams who did these things, who you know committed these crimes, and who thought so little of it, that he went and bought beer.
>
> We ask for **justice**. Thank you.

(Tr., Vol.III, p.974, L.12 – p.975, L.1 (emphasis added).)

Mr. Adams' arguments as to why these comments constituted misconduct are contained in his Appellant's Brief and need not be repeated in detail herein but are incorporated by reference. However, the State's apparent claim that such calls for "justice" are non-objectionable if they are "for" the various crimes that a defendant is charged with is logically flawed. A prosecutor's appeals to the passions and prejudices of the jury do not become un-objectionable merely because the prosecutor ties those appeals to the crimes alleged. Whether it be a claim that the jury should be upset when a defendant raises a certain defense to a crime charged (*see State v. Phillips,* 144 Idaho 82, 156 P.3d 583 (Ct. App. 2007), or whether it be an appeal to racial or ethnic prejudices of the jurors in the hopes of convincing the jury to convict the defendant of the crime charged (*see State v. Romero-Garcia,* 139 Idaho 199, 203, 75 P.3d 1209, 1213 (Ct. App. 2003)), any time a prosecutor is asking the jury to convict a defendant based upon anything other than the evidence that was presented, and the law upon which they are instructed, the prosecutor has committed misconduct.

As the State noted, the prosecutor argued to the jury:

> We are asking that you find Clayton Adams guilty of three counts of attempted robbery for demanding money from the back seat passengers and threatening to stab them if he didn't get the cash.
>
> We are asking that you find Clayton Adams guilty of aggravated battery for stabbing Stephen Maylin as he tried to run away.
>
> And we are asking that you find Clayton Adams guilty of first degree murder for stabbing Tyler Gorley five times and leaving him to die in the road.

(Tr., Vol.III, p.973, L.24 – p.974, L.8. (*see also* Respondent's Brief, p.27).) These arguments were perfectly legitimate and presumably based upon the evidence the prosecutor believed supported a guilty verdict and the law as instructed. However, making these legitimate arguments does not excuse the prosecutor from later appealing to the passions and the prejudices of the jury by asking the jury to grant the alleged victims "justice." "Justice" is neither a factual finding nor a legal standard that the jury should have been concerned with. The State's argument is without merit.

The State further argues that even if the prosecutor's requests for "justice" were improper, the error did not amount to fundamental error. (Respondent's Brief, pp.29-30.) Mr. Adams' arguments as to why the prosecutor's comments constitute fundamental error and why such error is not harmless in this case are contained in the Appellant's Brief and need not be repeated in this Reply Brief but are incorporated herein by reference.

C. The Duties Of The Prosecutor On Closing Argument

The State articulates the following:

> Adams has not divulged any authority holding that a prosecutor's call for "justice" constitutes misconduct.[5] Such an argument begs two questions; (1) how is a defendant harmed by a request for justice? and (2) what, instead of justice, should prosecutors be asking of juries? Adams' argument runs counter to common sense.

(Respondent's Brief, p.29.) Mr. Adams will now answer the State's questions.

First, a defendant would not normally be harmed by a prosecutor's request for justice provided that the prosecutor was truly seeking "justice." A prosecutor's duty to seek justice was amply described by the United States Supreme Court and quoted by the Idaho Supreme Court.

> 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and ***whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done***. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. ***But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one***.'

State v. Wilbanks, 95 Idaho 346, 353-54, 509 P.2d 331, 338-39 (1973) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added)). However, the prosecutor's definition of "justice" in this case is not what the *Berger* and *Wilbanks* Courts had in mind.

When a prosecutor defines the term "justice" as being served only by a defendant's conviction and then provides this definition to the jury, the defendant is

---

[5] Mr. Adams asserted in his Appellant's Brief, that the prosecutor's calls for "justice" in this case were an appeal to the passions and prejudices of the jury and cited authorities holding that when a prosecutor appeals to the passions and prejudices of a jury, the prosecutor commits misconduct. (*See* Appellant's Brief, pp.22-26.)

harmed. This harm stems from the danger that, rather than deciding the case based upon the evidence presented and the law upon which they are instructed, the jury will determine the case based upon a desire to make amends for, as the prosecutor argued in this case, some erroneous perception that the jury owes it to the alleged victims to find the defendant guilty. Such a requests harms the defendant because his right to a fair trial, protected by the due process clause of the Fourteenth Amendment and Article I, § 13 of the Idaho Constitution, is denied. *See* U.S CONST. amd XIV; ID. CONST art. 1 § 13.

To answer the State's second question, there is an abundance of sources defining exactly what the State should (and should not be) be asking of juries. First - the jury instructions. In this case, Jury Instruction Number 4 instructed that to decide the case they were to determine the facts and apply those facts to the law that they were instructed upon. (J.I. 4.) They were in further instructed that "Neither sympathy not prejudice should influence you in your deliberations." (J.I. 4.) Jury Instruction Number 4 in this case corresponds to Idaho Criminal Jury Instruction 104 - TRIAL PROCEDURE & EVIDENCE. *See* www.isc.idaho.gov/CRJURY/100PRE.RTF.[6]

The American Bar Association has articulated its own standards governing what prosecutors should and should not ask of jurors. "ABA Criminal Justice Section Standards, Prosecution Function, Standard 3-5.8, Arguments to the Jury" reads as follows:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

[6] Last visited on January 9, 2009.

(b) The prosecutor should not express his or her personally belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

See www.abanet.org/crimjust/standards/pfunc_blk.html.[7]

Finally, Idaho precedent is also an excellent source for determining what a prosecutor should and should not be asking of juries. In *Phillips*, the Court of Appeals provides a summary, complete with citations, of the purpose of closing argument and what a prosecutor should refrain from arguing:

> Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *Herring v New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593, 600 (1975). Its purpose "is to enlighten the jury and to help the jurors remember and interpret the evidence." *State v. Reynolds,* 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct.App.1991). "Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *State v. Sheahan,* 139 Idaho 267, 280, 77 P.3d 956, 969 (2003).
>
> Considerable latitude, however, has its limits, both in matters expressly stated and those implied. Closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Id.; State v. Garcia,* 100 Idaho 108, 110-11, 594 P.2d 146, 148-49 (1979); *State v. Lovelass,* 133 Idaho 160, 169, 983 P.2d 233, 242 (Ct.App.1999); *State v. Brown,* 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct.App.1998); *State v. Priest,* 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct.App.1995); *State v. Ames,* 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct.App.1985). Nor should it include disparaging comments about opposing counsel, *Sheahan,* 139 Idaho at 280, 77 P.3d at 969; *State v. Page,* 135 Idaho 214, 223, 16 P.3d 890, 899 (2000); *Brown,* 131 Idaho at 69, 951 P.2d at 1296; *State v. Baruth,* 107 Idaho 651, 657, 691

[7] Last visited on January 9, 2009.

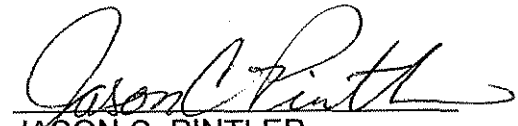
> P.2d 1266, 1272 (Ct.App.1984), or inflammatory words employed in describing a witness or defendant. *State v. Hairston,* 133 Idaho 496, 507, 988 P.2d 1170, 1181 (1999); *State v. Kuhn,* 139 Idaho 710, 715-16, 85 P.3d 1109, 1114-15 (Ct.App.2003). A closing argument may not misrepresent or mischaracterize the evidence, *State v. Raudebaugh,* 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *State v. Griffiths,* 101 Idaho 163, 166, 610 P.2d 522, 525 (1980); *State v. Tupis,* 112 Idaho 767, 771-72, 735 P.2d 1078, 1082-83 (Ct.App.1987), unduly emphasize irrelevant facts introduced at trial, *State v. Smoot,* 99 Idaho 855, 860, 590 P.2d 1001, 1006 (1978), refer to facts not in evidence, *Griffiths,* 101 Idaho at 166, 610 P.2d at 525; *State v. Martinez,* 136 Idaho 521, 525, 37 P.3d 18, 22 (Ct.App.2001); *State v. Cortez,* 135 Idaho 561, 565-66, 21 P.3d 498, 502-03 (Ct.App.2001); *Lovelass,* 133 Idaho at 169, 983 P.2d at 242, argue as substantive evidence matters admitted for limited evidentiary purposes, *Hairston,* 133 Idaho at 507-08, 988 P.2d at 1181-82, or misrepresent the law or the reasonable doubt burden. *Raudebaugh,* 124 Idaho at 769, 864 P.2d at 607; *Lovelass,* 133 Idaho at 168, 983 P.2d at 241; *State v. Missamore,* 114 Idaho 879, 882, 761 P.2d 1231, 1234 (Ct.App.1988). The credibility of a witness may not be bolstered or attacked by reference to religious beliefs, *State v. Sanchez,* 142 Idaho 309, 318, 127 P.3d 212, 221 (Ct.App.2005), and appeals to racial or ethnic prejudices are prohibited. *State v. Romero-Garcia,* 139 Idaho 199, 203, 75 P.3d 1209, 1213 (Ct.App.2003). In a criminal case, a prosecutor may not directly or indirectly comment on a defendant's invocation of his constitutional right to remain silent, either at trial or before trial, for the purposes of inferring guilt. *State v. Strouse,* 133 Idaho 709, 713-14, 992 P.2d 158, 162-63 (1999); *State v. Hodges,* 105 Idaho 588, 592, 671 P.2d 1051, 1055 (1983); *State v. McMurry,* 143 Idaho 312, 314, 143 P.3d 400, 402 (Ct.App.2006); *State v. Stefani,* 142 Idaho 698, 700-03, 132 P.3d 455, 457-60 (Ct.App.2005). Lastly, and of particular importance to the present case, appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible. *Raudebaugh,* 124 Idaho at 769, 864 P.2d at 607; *State v. Smith,* 117 Idaho 891, 898, 792 P.2d 916, 923 (1990); *State v. LaMere,* 103 Idaho 839, 844, 655 P.2d 46, 51 (1982); *Griffiths,* 101 Idaho at 168, 610 P.2d at 527.

Phillips, 144 Idaho at 86-87, 156 P.3d at 587-88 (footnote omitted.) Thus, there is an abundance of sources available not only answer the State's question as to what prosecutors should be asking of juries, but also what prosecutor's should not be asking of juries. The State's apparent assertion that the prosecutor in this case did exactly what prosecutors are supposed to do, and could not do anything else, is without merit.

CONCLUSION

Mr. Adams respectfully requests that this Court vacate his conviction and remand his case to the district court. Alternatively, Mr. Adams requests that this Court reduce his sentences as it deems appropriate.

DATED this 14th day of January, 2009.



JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of January, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

CLAYTON ADAMS
INMATE # 73027
ICC
PO BOX 70010
BOISE ID 83707

RENAE HOFF
DISTRICT COURT JUDGE
E-MAILED COPY OF BRIEF

DAYO O ONANUBOSI
ATTORNEY AT LAW
PO BOX 606
CALDWELL ID 83606-0606

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
P.O. BOX 83720
BOISE, ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court

EVAN A. SMITH
Administrative Assistant

JCP/eas